70-244

No. ~~1788-1~~

Supreme Court, U.S.
FILED
JUN 7 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANTHONY BRADLEY EBEN
1 North LaSalle Street
Chicago, Illinois 60602

MILTON K. JOSEPH
120 West Madison Street
Chicago, Illinois 60602

CHARLES LIEBMAN
120 West Madison Street
Chicago, Illinois 60602

RAYMOND I. SUEKOFF
120 West Madison Street
Chicago, Illinois 60602
Attorneys for Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT INDEX

	PAGE
Opinion	2
Jurisdiction	2
Questions presented	3
Constitutional provisions, statutes, and rules of court involved	5
Statement of the case	10
Reasons for granting the writ	17
Conclusion	24

TABLE OF AUTHORITIES CITED

CASES

Bolling v. Sharpe, 347 U.S. 497, 499, 500	21
Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1	22
Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 179	20
Consolidated Pretrial Proceedings in Antiobiotic Trust Actions, 14 F.Rules Serv. 2, 1237, 1239	14
Emich v. General Motors Corp., 340 U.S. 558, 568	23
Federal Trade Commission v. General Motors Corporation, 34 F.T.C. 58	12
Flast v. Cohen, 392 U.S. 83, 108, 119, 120	18
Fortner Enterprises v. U. S. Steel Corporation, 394 U.S. 495, 502 (1969)	18, 23
General Motors Corporation v. Washington, 377 U.S. 436, 442, 452	11

PAGE

Gillespie v. U. S. Steel Corp., 379 U.S. 148 19

Hawaii v. Standard Oil Co., No. 1060 in this Court, Cert. granted Mar. 1, 1971 14

Kingsley v. Brown, 354 U.S. 436, 441, 445 20

Lovell v. Griffin, 303 U.S. 444 22

Minnesota M&M Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318, 319 23

NAACP v. Button, 371 U.S. 415 22

Near v. Minnesota, 283 U.S. 697 22

Parker v. Brown, 317 U.S. 341 14

Poller v. Columbia Broadcasting System, 368 U.S. 464, 469 11

Radovich v. National Football League, 352 U.S. 445, 454 23

Schneider v. Rusk, 377 U.S. 163, 168 22

Shapiro v. Thompson, 394 U.S. 618, 641-642 22

United States v. General Motors Corporation, 384 U.S. 127 12

United States v. General Motors Corporation, et al., 121 F.2d 376 12

United States v. Greater Buffalo Press Inc., U.S. Sup. Ct., Oct. Term 1970, No. 821 13

United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 22

United Transportation Union v. State Bar of Michigan, ... U.S. ....., 91 S.Ct. 1076 ..... 22, 23

Walker v. Birmingham, 388 U.S. 307, 320 20

PAGE

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment I 5, 19, 20, 21

Amendment V 4, 5, 15, 21

STATUTES

United States Code

Title 15, Section 1 .....5, 10

Title 15, Section 2 .....5, 10

Title 15, Section 15 .....5, 10

Title 15, Section 18 .....6, 10

Title 15, Section 26 .....6, 10

Title 28, Section 1254(1) 2

Title 28, Section 1291 6-7

Title 28, Section 1292(a)(1) 6, 25

Title 28, Section 2071 7

Title 28, Section 2072 7

RULES OF COURT

Rules of the Supreme Court of the United States, Rule 23(j)(5) 1

Federal Rules of Civil Procedure, Rule 23(c)(1) .....
.....4, 7, 8, 9, 15, 16, 24, 25

Rules of the District Court of the Northern District of Illinois, Civil Rule 22 .....
.....3, 4, 7-8, 15, 17, 19, 20, 21, 22, 23, 25

Rules of the United States District Court for the Southern District of New York, Rule 11a 9-10, 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,

Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review three judgments of the United States Court of Appeals for the Seventh Circuit, entered respectively on February 12, 1971 (Consolidated Appeals Nos. 18939-18940 below) (App. 37a), on February 12, 1971 (Mandamus No. 71-1104 below) (App. 49a), and on February 26, 1971 (Mandamus No. 71-1122 below) (App. 61a), which involve identical and closely related questions. A single petition for writ of certiorari covering all the cases suffices. Rule 23(j)(5), Rules of the Supreme Court of the United States.

Opinion.

The Court of Appeals did not file an opinion in any of the three cases sought to be reviewed herein.

The District Court for the Northern District of Illinois likewise did not file any opinion.

JURISDICTION

1. Consolidated cases below Nos. 18939-18940 came to the Court of Appeals as appeals from the United States District Court for the Northern District of Illinois. Judgment of dismissal was entered February 12, 1971 (App. 37a). A petition for rehearing was filed on February 25, 1971 (App. 37a) and denied on March 10, 1971 (App. 39a).

2. Case No. 71-1104 below came to the Court of Appeals as an original petition for mandamus, involving identical and closely related question to those in the consolidated appeals Nos. 18939-18940, and in Mandamus No. 71-1122. Judgment of denial was entered on February 12, 1971 (App. 49a). A petition for rehearing was filed on February 25, 1971 (App. 50a), and was denied on April 8, 1971 (App. 51a).

3. Case No. 71-1122 below came to the Court of Appeals as an original petition for mandamus, involving identical and closely related questions to those in the consolidated appeals Nos. 18939-18940, and in Mandamus No. 71-1104. Judgment of denial was entered on February 26, 1971 (App. 61a). A petition for rehearing was filed on March 11, 1971 (App. 62a) and was denied on March 16, 1971 (App. 63a).

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

A. With Regard to the Denial by the District Court of Plaintiffs' Motion for Leave for their Attorneys to Communicate, Consult and Advise with the Attorneys General of the States.

1. Was it not an abuse of discretion or otherwise error for the District Court to deny plaintiffs' motion for leave to communicate, consult and advise with the Attorneys General of the States without plaintiffs first being required to obtain an order of court approving such communication?

2. Is not District Court Civil Rule 22[1] in form and effect an injunction, and is it not in conflict with applicable decisions of this Court, and is it not so far a departure from the accepted and usual course of judicial proceedings, sanctioned by the Court of Appeals, as to call for an exercise of this Court's power of supervision?

3. Did not the District Judge, in denying plaintiffs' motion for leave to communicate, consult and advise with the Attorneys General of the States without first being required to obtain a order of court approving such communication

---

[1] District Court Civil Rule 22 reads as follows:

Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of the Court.

(a) abridge the First Amendment right of free speech and press of plaintiffs and the members of their class?

(b) abridge the First Amendment right peaceably to assemble and petition the government for redress of grievances, of plaintiffs and the members of their class?

(c) deny Fifth Amendment due process of law to plaintiffs and the members of their class?

4. Does not District Court Rule 22 unconstitutionally

(a) abridge the First Amendment right of free speech and press of plaintiffs and the members of their class?

(b) abridge the First Amendment right peaceably to assemble and petition the government for redress of grievances, of plaintiffs and the members of their class?

(c) deny Fifth Amendment due process of law to plaintiffs and the members of their class?

With Regard to the Denial by the District Court of Plaintiffs' Motion That the Court Make a Class Action Determination Order under Federal Rules of Civil Procedure 23(c)(1):

5. Was it not a clear abuse of discretion for the District Court to deny plaintiffs' motion under F.R.Civ.Proc. 23(c)(1) requesting the court to determine by order (more than 2 years having elapsed since the filing of the action without the entry of such an order), whether the action should be maintained as a class action, so that the denial of mandamus by the Court of Appeals was erroneous?

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF COURT

The Constitution of the United States:

Amendment I. "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V. "No person shall * * * be deprived of life, liberty or property without due process of law."

United States Code

Tit. 15 § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; * * *.

Tit. 15 § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

Tit. 15 § 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Tit. 15 § 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *

Tit. 15 § 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, * * *.

Tit. 28 § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

Tit. 28 § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *.

Tit. 28 § 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Tit. 28 § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

As amended Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

Federal Rules of Civil Procedure

Rule 23. Class Actions

* * * * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise

shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Civil Rules of the United States District Court for the Northern District of Illinois

Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of the Court.

Rules of the United States District Court for the Southern District of New York

Rule 11A. Class Actions.

(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed R Civ P 23(c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within

thirty (30) days after expiration of the time allowed for such motion, to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances. [Adopted and effective 4-30-70.]

STATEMENT OF THE CASE

1. The Nature of the Action

The action now pending in the District Court at Chicago is a consumers class antitrust suit, brought under 15 U.S.C. Sections 1, 2, 15, 18, & 26, against General Motors Corporation (hereafter called GM), by 5 individual plaintiffs who as consumers purchased GM automobiles, on behalf of all such purchasers within the 4-year period of the statute of limitations. The complaint asserts that GM over many years has been unjustly enriching itself at the expense of the consumer-purchasers of its automobiles by engaging in predatory violations of the antitrust laws which have enabled GM to suppress competition and to obtain excessive prices for its automobiles. (Record in case Nos. 18939-40 pp. C9-C71, C236-C315)

The Complaint

GM as a holding company acquired the shares of five principal automobile producers: Buick, Cadillac, Chevrolet, Oakland (later called Pontiac), and Oldsmobile, in 1917 and 1918. These five businesses have continued to be operated by GM as separate entities, selling cars in competition against each other throughout the United States. (Although the original independent corporations, transformed on acquisition into GM subsidiaries, have been dissolved,

their separate businesses have been continued to be conducted in non-corporate form as substantially independently operated business entities, under the description of "Divisions." (*General Motors Corporation* v. *Washington,* 377 U.S. 436, 442, 452. (The question of whether "Divisions" of this type come within the rule as to corporate subsidiaries was noticed by this Court in 1962 in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 469, and is still open in this Court. *Poller,* 368 U.S. 464, 469, where the Court said, in footnote 4:

> "We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries.")

Monopoly

Prior to 1964, GM had attained over 50% of the market in the United States in American-style automobiles, and has maintained that position up to the present [Note: except for the strike-year of 1970, when the percentage of the market dropped on account of the strike to 46.4%]. GM's profits have been and are so large that GM could have (and still can) reduce its prices to a point where GM's competitor's Ford, Chrysler and American Motors would be driven out of business, and GM would still make a profit. Ford, Chrysler and American Motors are the only remaining United States automobile manufacturers. American Motors, the smallest competitor, although doing close to a billion dollars a year in sales, has sustained operating losses of over $130,000.000 in recent years, and is in failing condition; and in the face of GM's market power, no new producer would dare to enter the business of manufacturing and distributing standard size cars in the United States. GM thus had attained and has main-

tained monopoly power in the United States standard-sized-automobile market.

For the purpose of increasing its share of the market and attaining and maintaining this monopoly power, GM has predatorily violated the anti-trust laws. [There have been at least three adjudicated contested cases: *U.S.* v. *General Motors Corp. et al.*, 121 F.2 376 (CA7 1941), conspiracy to monopolize financing of automobile sales; *FTC* v. *General Motors Corporation*, 34 F.T.C. 58 (1941), monopolization of replacement parts for automobiles; *U.S.* v. *General Motors Corporation*, 384 U.S. 127 (1966), suppression of competition in the retail sale of automobiles.]

Price Fixing

In addition to the predatory violations of which GM was adjudicated guilty in the foregoing cases, GM has utilized and utilizes two price-fixing practices to increase its share of this market. The first form is by having the prices charged for cars by the "Divisions", which compete vigorously in the market against each other, set by central management of GM.. If the "Divisions" come within the rule which applies to corporate subsidiaries, this is a *per se* violation. The second form of price-fixing is by the use of the General Motors Holding Plan. GM has for many years, as a holding company, created and maintained hundreds of retail-dealership *corporate* subsidiaries (currently about 450), in which GM owns all the voting stock, which compete in the relevant market against each other, against all other GM non-subsidiary retail dealers, and against the "Divisions" of GM themselves, which sell directly to consumers. GM fixes the prices at which its retail-dealership-subsidiary corporations buy their cars from its "Divisions," and at which they sell their cars in the competitive market described in the previous sentence.

As a result of the combination of the five original independent companies into GM, the acquisition and maintenance of monopoly power by GM's adjudicated illicit and predatory means, and the above described price-fixing practices, the prices which GM has charged for its cars have been in excess of those which it would have been able to charge if the unlawful anti-competitive situations thereby created and maintained had not existed. This excess has unjustly enriched GM, and *pro tanto* has damaged in their property the consumer-purchasers who have paid it; for which damage GM should reimburse them. The injunctive power of the court should be exercised to prevent GM from continuing its predatory practices in the future, which may require a decree of divestiture of one or more of the "Divisions," which are still in the market as continuations of the companies originally acquired in 1917 and 1918. (Rec. in case Nos. 18939-18940, pp. C236-C315; See: *United States* v. *Greater Buffalo Press Inc.*, No. 821 in this Court decided June 1, 1971.)

The present status of the action in the District Court is: GM has filed a motion to dismiss the amended complaint on the ground that it fails to state a claim on which relief might be granted. The District Court has not yet ruled on the motion.

2. Plaintiffs' Motion Relating To District Court Civil Rule 22

Civil Rule 22 was adopted by the District Court on April 15, 1970. By its terms, once a class action is filed, the plaintiffs in it and their attorneys are absolutely forbidden from all communication whatever concerning the action with other members of the class, without first submitting the communication to the court and obtaining from the court an order approving the communication.

The 50 States of the United States are the most important and strongest members of plaintiffs' consumers class. *Parker* v. *Brown*, 63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315 They purchase large quantities of GM cars in their own right for employees, officials and departments. They are proper representatives of their multitudinous political subdivisions which make similar purchases. They may be proper representatives under the doctrine of *parens patriae* of their residents who are consumer-purchasers. (See *In re Consolidated Pretrial Proceedings in Antiobiotic Trust Actions*, 14 F. Rules Serv. 2. 1237, 1239; and *Hawaii* v. *Standard Oil Co.*, No. 1060 in this Court, Cert. granted Mar. 1, 1971.) Plaintiffs attorneys came to the decision that they wished to advise and consult with the Attorneys General of the States concerning the action. Such advice and consultation is of great mutual importance. There are serious unsettled questions as to the statute of limitations.

There are questions of strategy, tactics and policy of the utmost importance to be resolved. How best to deal with a $24 billion colossus, a veritable super-tiger in the competitive jungle? Whether to move for summary judgment, or to have a full dress plenary trial. What information do the States Attorneys General have access to which might aid the action? What advice might they want to offer concerning the action?

It is immediately apparent that such consultation concerning mutual rights and interests cannot effectively take place if all communications must first be submitted to the court for approval. The give-and-take of oral discussion, brainstorming, is ruled out. The confidentiality of the attorney-client relationship is destroyed. The court and the opponent have access to not only the work-product, but to the work-process as well.

Plaintiffs' counsel accordingly on September 25, 1970, moved for permission to enter into communication with the Attorneys General of the States, to consult and advise with them about the action, without being required to submit their communications in advance to the Court and to obtain an order of approval. The motion was addressed initially to the sound discretion of the court, and alternatively it was asserted that Civil Rule 22 was an injunction improvidently issued and in violation of the First and Fifth Amendment rights of class members. (App. 1a, 6a, 48a). The motion was denied without opinion. (App. 7a-8a). An appeal from the order of denial was dismissed without opinion. (App. 37a) A petition for mandamus in the Court of Appeals to direct the District Court to grant such permission, or to expunge Civil Rule 22 as unconstitutional and void, was denied without opinion. (App. 49a).

3. Plaintiffs' Motion for a Class Suit Determination Order Under Federal Rule of Civil Procedure 23(c)(1).

On September 25, 1970, plaintiffs' counsel made a further motion that the District Court determine by order whether the action should be maintained as a class action, as would seem to mandated by F.R.Civ.Proc. 23(c)(1), the action having been then pending for more than 2 years. (Compare Rule 11 of the Southern District of New York, which now requires the plaintiff to make the motion for class action determination within 60 days after action filed.) The motion for determination was denied without opinion. An appeal was taken (App. 7a-8a), and a concomitant mandamus was filed in the Court of Appeals (App. 40a). The appeal was dismissed (App. 37a) and the mandamus was denied (App. 61a), all without opinion.

Plaintiffs bring this petition for certiorari:

(a) to obtain a judgment of this Court that plaintiffs may communicate, consult and advise with the Attorneys General of the States concerning the action; and

(b) to obtain a judgment of this Court that plaintiffs are entitled to an order under F.R.Civ. Proc. 23 (c)(1) to determine whether the action below shall be maintained as a class action.

REASONS FOR GRANTING THE WRIT.

I.

DISTRICT COURT CIVIL RULE 22 IS A FAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Diligent research has failed to disclose any previous "rule", injunction or case in the entire history of Anglo-American judicial practice, imposing a general total prior restraint on communication between plaintiffs in a class suit and members of their class. Even those courts which were hostile to NAACP and subjected it and its lawyers to criminal prosecutions, contempt punishment, and exclusionary and disciplinary proceedings, never imposed prior restraint on communication.

Consequently, District Court Civil Rule 22, whether treated as innovation or as aberration, should be considered such a departure by the District Court, sanctioned by the Court of Appeals, from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

II.

AT THE VERY LEAST, THE DENIAL BY THE DISTRICT COURT OF PLAINTIFFS' MOTION THAT THEY AND THEIR COUNSEL BE PERMITTED TO COMMUNICATE, CONSULT AND ADVISE WITH THE ATTORNEYS GENERAL OF THE STATES, WAS A CLEAR ABUSE OF DISCRETION, TO REDRESS WHICH THE COURT OF APPEALS SHOULD HAVE AFFORDED PLAINTIFFS A REMEDY, EITHER BY APPEAL OR BY MANDAMUS.

Supposing *arguendo* that Civil Rule 22 were valid, it was surely a clear abuse of discretion by the District Court

totally to refuse plaintiffs' motion to communicate with the Attorneys General of the States.

First, the States themselves, as retail-consumer-purchasers in their own right, were members of plaintiffs' consumer class. They were thus clients, willy-nilly, of plaintiffs' attorneys. It would be a hard thing, as the English judges used to say, if the law, or the judge's discretion could prevent the States from being advised by their attorneys-as-a-matter-of-law, of the existence of the action, or from being furnished with a copy of the complaint.

Second, common sense and right reason demand that, in a class action such as this, brought by a few individuals whose interests are not large enough to justify a non-class-action, the existence of the action should be made known to other members of the class with substantial interests, especially since questions of limitations are immediately involved, so that such other class members may have an opportunity to consider what action they wish to take to assert and maintain their claims; and especially after the action has been pending for over 2 years, and is being attacked by a motion to dismiss.

Third, since plaintiffs in private anti-trust suits are vindicating the important public interest in free competition (*Fortner Enterprises* v. *U.S. Steel Corporation*, 394 U.S. 495, 502 [1969]), they are to that extent private attorneys general (see *Flast* v. *Cohen*, 392 U.S. 83, 108, 119-120), and it would further the public interest to have them communicate, consult and advise with the other Attorneys General. How could it conceivably be in the public interest that the Attorneys General of the States might not even be informed of the existence of the action until, perchance, after it had been dismissed?

Fourth, since the interdict of Civil Rule 22 is total, if the District Court (or the Court of Appeals) had thought that the motion to communicate, consult and advise with the Attorneys General was asking too much, the Court should have indicated what limited communication it would permit, and what conditions and restrictions it wanted on the communication.

Fifth, the Court had and has ample power to impose punitive and disciplinary sanctions after the fact, if violations or improprieties in the communication be called to its attention, which is more in the public interest than total prior restraint.

It was thus an abuse of discretion for the court to *completely* cut off plaintiffs from communication with the States Attorneys General. This abuse of discretion should have been corrected either by the Court of Appeals allowing the appeal because of necessity and importance (*Gillespie* v. *United States Steel Corporation,* 379 U.S. 148 and cases cited), or by allowing mandamus for abuse of discretion.

III.

A. District Court Civil Rule 22 "Stands the First Amendment on its Head," and Should be Declared Void.

District Court Civil Rule 22 is utterly subversive of the great First Amendment guarantees of freedom of communication and freedom of petition.

The Rule is an *ex parte* total prior restraint of communication. It sets up the District Court as legislator, licenser, censor, and tribunal to try and punish supposed violations of the Rule. Communication without application for permission, which if denied must be appealed to

the highest court, seems to be contempt of court. Guilt and punishment arise, not from any fault in the content of the communication, but from the fact of communication itself. *Walker* v. *Birmingham,* 388 U.S. 307, 320. See also *Carroll* v. *President & Commissioners of Princess Anne,* 393 U.S. 175, 179.

The Rule does not purport to be based on any supposed exception to or limitation of the fundamental overriding principle against prior restraint. Even in the often-criticized case of *Kingsley Books* v. *Brown,* 354 U.S. 436, Mr. Justice Frankfurter, in sustaining an injunction against *further* distribution of a book *previously* found to be obscene, hastened to reassure: "To be sure, the limitation is the exception. It is to be closely confined so as to preclude what may fairly be deemed to be licensing or censorship." Kingsley, 354 U.S. 436, 441. "* * * [I]t studiously withholds restraint upon matters *not already published* and *not yet found to be offensive.*" 354 U.S., 445. (Emphasis supplied.)

The District Court asserts by District Court Civil Rule 22 that it has absolute authority to impose *total* prior restraint against litigants and their lawyers. All communication between them and the other members of their class is presumptively tainted. If plaintiffs wish to communicate with members of their class who are not parties, concerning their common interests, they must obtain a license from the District Court. They must first beseech the District Court as a suppliant beseeches an Oriental despot for a license. There are no standards. There is no way of knowing what burden they must assume, to move the Court to grant the license. If the Court denies the license, *or if he merely fails to act on their application,* they remain gagged. The District

Court need give no reason. The Court of Appeals will not entertain an appeal; nor will it mandamus the District Court.

A more total repudiation of constitutional principle is impossible to conceive. Truly, Civil Rule 22, on its face and as construed and applied here, stands the First Amendment on its head and should be declared void. No other District Court has adopted such a rule.[1]

B. District Court Civil Rule Denies the Plaintiffs and Their Class Fifth Amendment Due Process.

Absent Civil Rule 22, the plaintiffs and their counsel are free to pursue the common interest of plaintiffs' class, which includes and can only be effectuated by the right of communication, counselling, advice, assembly and petition, guaranteed by the First Amendment. These rights cannot be restricted under the Fifth Amendment except for a proper compelling governmental objective. Total restraint of communication is not, and cannot be shown to be reasonably related to any proper governmental objective, and such total restraint thus imposes on plaintiffs and their class, in the assertion of their claims against GM, an unconscionable and crushing burden, that constitutes an arbitrary deprivation of their liberty and property in violation of the Fifth Amendment, and is a discrimination against them as a group plaintiff that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500;

---

[1] We are advised that the Board of Managers of the Chicago Bar Association has within the past month advised the Chief Judge of the District Court below that it supported a Bar Association Committee report saying that District Court Civil Rule 22 is unconstitutional, and that it ought to be abrogated.

See also *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642.

C. District Court Civil Rule 22 Is In Conflict With Applicable Decisions Of This Court.

1. District Court Civil Rule 22 is of course in conflict with all the applicable decisions of this Court which hold that First Amendment rights are preferred rights; that any exceptions allowed against them are to be couched in the narrowest terms and the door is to be opened no more than absolutely necessary; that in the absence of a showing of clear and present danger that the supposed untoward social results of allowing freedom of communication will outweigh the benefits, the First Amendment freedoms should be sustained; and persons may not be confined to the expression of those sentiments which are officially approved.

Near v. *Minnesota*, 283 U.S. 697; *Lovell* v. *Griffin*, 303 U.S. 444, and innumerable other cases.

2. District Court Civil Rule 22 is also in conflict with that applicable line of decisions of this Court which holds that the First Amendment guarantees of free speech, petition and assembly give persons the right to cooperate in helping and advising one another to act collectively by group legal action to obtain affordable and effective legal representation, and meaningful access to the courts.

United Transportation Union v. *State Bar of* Michigan ..... U.S. ....., 91 S.Ct. 1076 (1971)
United Mine Workers v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967)
Brotherhood of Railroad Trainmen v. *Virginia State Bar* 377 U.S. 1 (1964)
NAACP v. *Button*, 371 U.S. 415 (1963)

3. District Court Civil Rule 22 is also in conflict with that applicable line of decisions of this Court which holds that private antitrust suits are to be encouraged to vindicate the important public interest in free competition. The courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws". *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 502. Private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. Persons of small means bringing private suits are to be aided, not impeded, and the policy of the law is to assist them by making available to them governmental resources, expertise and evidence. *Minnesota M&M Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318, 319. See also *Emich* v. *General Motors Corp.*, 340 U.S. 558, 568.

4. District Court Civil Rule 22, which both in form and effect is an injunction, is in conflict with the decisions of this Court holding that

> "an injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal, and that the defendant, if not enjoined, will engage in such conduct." *United Transportation Union* v. *State Bar of Michigan*, 91 S.Ct. 1076, 1081 ..... U.S. ....., (1971).

There is nothing whatever in the records sought to be reviewed by this petition showing any previous illegal conduct, or that the plaintiffs and/or their lawyers, if not restrained, would engage in illegal conduct.

CONCLUSION

The special and important reasons for the granting of certiorari are:

1. This case itself is of great special intrinsic and immediate public importance, involving on the one side, more than half of the new-car purchasers of the United States, and on the other, the largest non-regulated manufacturing and mercantile enterprise in the history of the world; and involving the validity of prior restraint, by the courts, of communication, consultation and advice between class-members in class actions; and involving the administration of F. R. Civ. Proc. 23(c)(1). These problems are neither academic nor episodic, but are existing and bound to occur with great frequency in the future.

2. The Court of Appeals has decided important questions of federal statutory and constitutional law, and of the interpretation of the rules of this Court, which have not been, but should be, settled by this Court; and has decided important federal questions in ways which are in conflict with applicable decisions of this Court: and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departures by the District Court, as to call for an exercise of this Court's power of supervision, in that:

(a) It has denied to the plaintiffs remedy by appeal or mandamus from, and has thus sanctioned, the District Court's order refusing plaintiffs' motion to communicate consult and advise with, other members of their class, namely the States, through their Attorneys General.

(b) It has refused to hear and decide the appeal by the plaintiffs under 28 U.S.C. § 1292(a)(1), from an order of the District Court denying the motion by plaintiffs to treat Civil Rule 22 as an injunction, and to dissolve or modify the injunction.

(c) It has sanctioned the adoption and retention of Civil Rule 22 by the District Court, which stands the First Amendment on its head.

(d) It has denied to the plaintiffs remedy by appeal or mandamus from, and has sanctioned the denial by the District Court of, plaintiffs' motion, made more than 2 years after action commenced, that the District Court make a Rule 23(c)(1) order as to whether the action below should be maintained as a class action.

3. If the positions taken by the Court of Appeals with regard to the foregoing matters be adopted with relation to other class actions, then the Class-action remedy, ancient in our jurisprudence, absolutely necessary to afford the "little man" equal justice under law, and reinforced and encouraged by F.R.Civ. Proc. 23 of this Court, will become subject, not to law, but to the despotic, unreviewable whim and caprice of the District Judges; and will be stifled and emasculated.

Respectfully submitted,

ANTHONY BRADLEY EBEN
MILTON K. JOSEPH
CHARLES LIEBMAN
RAYMOND I. SUEKOFF
Attorneys for Petitioners